IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALFREDO VILLOLDO, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 4:13-mc-94014-TSH**
FIDEL CASTRO RUZ, *et al.*,	)	
Defendants,	)	
v.	)	
COMPUTERSHARE LTD.	)	
Trustee Process Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES AND REGULATIONS

STATE REGULATIONS

LEGISLATIVE MATERIAL

INTRODUCTION

The United States, by and through its undersigned counsel, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] in order to advise the Court of its views as to whether plaintiffs may seek to satisfy a judgment in their favor against the Government of Cuba by attaching and executing on certain blocked assets located in this district. The United States emphatically condemns the actions that give rise to this case, and expresses its deep sympathy for the victims and their family members. However, the Government also has a significant interest in ensuring that laws and regulations pertaining to the attachment of assets blocked pursuant to economic sanctions on foreign countries, which have a profound impact not only on how sanctions programs are administered but, more broadly, on the conduct of the foreign relations of the United States, are properly construed by the courts.

Specifically at issue in this case is whether the assets on which plaintiffs seek to execute are owned by Cuba. This Court has determined that they are, by virtue of two Cuban laws that—according to plaintiffs—operated to nationalize those assets. The United States requests that the Court reconsider this determination. As explained below, the Government respectfully submits that the Court did not have the opportunity to fully and properly analyze whether Cuban law is the source of the appropriate substantive law to be applied in this case, whether a U.S. court should enforce these particular Cuban laws, and whether the laws operate as plaintiffs claim. If, upon reconsideration in light of the principles outlined herein, the Court concludes that the assets at issue are not blocked assets "of" Cuba, then the Turnover Order should be rescinded because these assets are subject to a comprehensive Cuban embargo and fall outside the license exception provided by the Terrorism Risk Insurance (TRIA), and thus cannot be transferred without a license from the Department of the Treasury's Office of Foreign Assets Control (OFAC). Such transfer would undermine the Cuban asset control regime, would be inconsistent with the

[1] This provision provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. It provides a mechanism for the United States to submit its views in cases in which it is not a party. *See, e.g.*, *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 288 n.4 (S.D.N.Y. 2000).

purposes of the relevant statutory scheme by forcing potentially innocent third parties to subsidize Cuba's alleged wrongs, and would be incompatible with important U.S. foreign policy interests.

BACKGROUND

I. Statutory and Regulatory Background

This case involves the intersection of three related sources of statutory and regulatory authority—the Cuban Assets Control Regulations (CACR), the Foreign Sovereign Immunities Act (FSIA), and TRIA—which are summarized below.

A. The Cuban Assets Control Regulations

Since 1963, the United States has imposed a comprehensive embargo on virtually all trade with Cuba. *See Regan v. Wald*, 468 U.S. 222, 226 & n.4 (1984). The current terms of the embargo administered by the Department of the Treasury are reflected in the CACR, *see* 31 C.F.R. Part 515, which were promulgated pursuant to the Trading With the Enemy Act of 1917 (TWEA), codified at 50 U.S.C. App. § 1 *et seq.*, and the Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, codified in part at 22 U.S.C. § 2370. Section 5(b) of TWEA authorizes the President to regulate and prohibit a wide range of transactions or dealings in any property in which a foreign country or a national thereof has any interest. *See* 50 U.S.C. App. § 5(b)(1)(B); *see also DeCuellar v. Brady*, 881 F.2d 1561, 1562-63 (11th Cir. 1989). The President delegated his TWEA authority to the Secretary of the Treasury, who in turn delegated that authority to OFAC. *See Regan*, 468 U.S. at 226 n.2; *see also* 31 C.F.R. § 515.802.

Tracking section 5(b) of TWEA, the CACR prohibit any dealings in, or transfers of, any property in which Cuba or a Cuban national has an interest by any person subject to the jurisdiction of the United States, unless licensed by OFAC. *See* 31 C.F.R. § 515.201(b)(1). The "transfer" of a property interest is broadly defined in the CACR to include "any actual or purported act or transaction . . . the purpose, intent, or effect of which is to . . . transfer, or alter, any right, remedy, power, privilege, or interest with respect to any property . . . ." *Id.* § 515.310. This definition specifically includes the "issuance, docketing, filing, or the levy of or under any

judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment[.]" *Id.* The CACR also provide that, "[u]nless licensed . . . , any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property" subject to the regulations. *See id.* § 515.203(e).

B. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act, under which plaintiffs obtained their default judgment, provides the exclusive basis for civil actions brought against foreign states in federal and state courts in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989); *Universal Trading & Inv. Co., Inc. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 16 (1st Cir. 2013); *Weininger v. Castro*, 462 F. Supp. 2d 457, 477 (S.D.N.Y. 2006). The FSIA provides that a foreign state is immune from suit unless a statutory exception applies. *See* 28 U.S.C. § 1604; *id.* § 1330(a); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983); *Universal Trading*, 727 F.3d at 16. These include the so-called "terrorism exception," which provides that foreign states designated as state sponsors of terrorism shall not enjoy immunity in certain cases involving torture, extrajudicial killing, or other enumerated acts. *See* 28 U.S.C. § 1605A.[2]

A foreign state's assets are likewise generally immune from attachment under FSIA, *see* 28 U.S.C. § 1609, subject to several exceptions codified at 28 U.S.C. §§ 1610-1611. As relevant to a terrorism related judgment, one of these exceptions is found under section 1610(a)(7), which provides that a foreign state's property in the United States is not immune from attachment if it has been "used for a commercial activity in the United States" and "the judgment relates to a claim for which the foreign state is not immune under section 1605A." 28 U.S.C. § 1610(a)(7). Similarly, section 1610(b)(3) provides that the property of an "agency or instrumentality" of a foreign state is not immune if it is "engaged in commercial activity in the United States" and "the

[2] In 1982, Cuba was designated as a state sponsor of terrorism by the Department of State, pursuant to the Export Administration Act, 50 U.S.C. App. § 2405(j). *See also* Decl. of Peter M. Brennan (May 10, 2012), Statement of Interest of the United States, *Hausler v. Republic of Cuba*, No. 1:08-cv-20197 (S.D. Fla. May 10, 2012), ECF No. 97-1 (describing reasons for Cuba's designation) (attached as Exhibit A).

judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A." 28 U.S.C. § 1610(b)(3). The National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 (Jan. 28, 2008), added a special attachment provision for those plaintiffs who obtain a section 1605A judgment against a foreign state, which clarifies that when the property of a foreign state or its agency or instrumentality "is subject to attachment . . . *as provided in this section*," plaintiffs may attach such property to satisfy a judgment obtained against the foreign state under section 1605A without regard to whether the property is owned by the state itself or an agency or instrumentality of the state. *See* 28 U.S.C. § 1610(g) (emphasis added).[3]

C. Terrorism Risk Insurance Act

The Terrorism Risk Insurance Act, enacted by Congress in 2002, further addresses the circumstances under which a person holding a judgment obtained under section 1605A of FSIA may attach certain assets of foreign states that are terrorist parties. *See* Pub. L. No. 107-297, 116 Stat. 2322 (2002) (reprinted after 28 U.S.C. § 1610 Historical and Statutory Notes); *see also Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 54 (1st Cir. 2013). Section 201(a) of TRIA states:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605A], the blocked assets of that terrorist party (including blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Under TRIA, "terrorist parties" include foreign states that, like Cuba, have been designated as state sponsors of terrorism. *Id.* § 201(d)(4). Subject to several exceptions, "blocked assets" are

[3] This provision, however, is made subject to 28 U.S.C. § 1610(g)(3), which provides: "Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid or execution, or execution, upon such judgment."

in turn defined as assets seized or frozen by the United States under TWEA or the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702. *See* TRIA § 201(d)(2).

TRIA permits attachment of property in certain cases in which attachment might otherwise have been precluded by FSIA. *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 21 (D.C. Cir. 2010); *Weininger v. Castro*, 462 F. Supp. 2d 457, 483-89 (S.D.N.Y. 2006). TRIA allows victims of terrorism to attach "blocked assets" without first obtaining a license from OFAC. *See* TRIA § 201(a).

II. Factual and Procedural Background

Because the Court is familiar with the factual and procedural background of this case, the Government provides only a brief summary here. On August 19, 2011, plaintiffs obtained a default judgment in Florida state court against the Cuban government and Fidel and Raul Castro, in the amount of $2.8 billion, for alleged acts of torture between 1959 and 2003. In May 2013, plaintiffs filed the instant action in this Court in order to attach and execute on assets in this district in satisfaction of the Florida state court judgment. Specifically, plaintiffs seek to partially satisfy that judgment by attaching 383 securities and/or deposit accounts maintained by Computershare Ltd. ("Computershare") in the United States, which are registered to 70 distinct account holders. Because they are registered to individuals who listed Cuban addresses when they were established—which, according to plaintiffs, was in the 1950s at the latest—these accounts are blocked pursuant to the CACR. On December 11, 2013, the Court issued an order directing Computershare to turn over the assets in those accounts to plaintiffs (subject to a notice protocol and objections by the named account holders). *See* Turnover Order, ECF No. 27. The Court concluded that the accounts are owned by Cuba—and thus attachable under TRIA and FSIA—because of two 1959 Cuban laws that purportedly nationalized the assets of Cuban nationals held outside of Cuba. *See id.* ¶¶ 4-6. Due to pending motions between the parties, the turnover has not yet been completed.

The U.S. Departments of State and Justice learned of the issues raised by this matter only recently, through a communication by counsel for Computershare. On May 15, 2014, the

Government filed a Notice of Potential Participation, informing the Court that the United States was considering whether to file a Statement of Interest to address the question of whether assets not held in the name of Cuba or any agency or instrumentality of Cuba could be considered property "of" Cuba within the meaning of FSIA and TRIA by virtue of the application of Cuban law purporting to nationalize those assets. *See* ECF No. 61.

ARGUMENT

The United States has significant policy interests in assuring that TRIA and FSIA are properly construed, and that blocked assets are not transferred unless they fall within the narrow provisions that require that the assets be owned by a terrorist party. The Government respectfully submits that the Court's analysis of whether the Computershare accounts are assets "of" Cuba, within the meaning of TRIA and FSIA was materially incomplete. Specifically, as explained below, it appears that the Court did not apply a choice-of-law analysis before applying Cuban law; did not apply the "penal law rule," according to which courts in the United States generally decline to give effect to foreign penal laws and foreign penal judgments in civil proceedings; and did not fully scrutinize plaintiffs' questionable interpretation of the Cuban laws at issue. For these reasons, the United States urges this Court to exercise its inherent authority to reconsider its prior Turnover Order. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 475-76 (2005) (Ginsburg, J., dissenting) (recognizing the authority of district courts to reconsider their own decisions during the pendency of a proceeding); *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 61 n.2 (1st Cir. 2008) (same).

I. The Government's Participation Is Not Untimely

As an initial matter, the Government briefly addresses the timing of its participation in this case. After the United States filed its Notice of Potential Participation, plaintiffs submitted a filing in which they argued that the Government—specifically, OFAC—has been aware of this case since October 2013, and that its participation comes too late. *See* Pls.' Reply in Supp. of Mot. to Compel Re-Issuance of Certified Shares and Mot. to Complete Turnover ("Pls.' Reply")

at 5, ECF No. 64-1.[4] While the Government regrets that its participation may appear to be belated in light of this prior notice to OFAC, it is nonetheless not untimely.

OFAC is served with numerous documents relating to TRIA litigation, and receives a significant amount of correspondence and inquiries from financial institutions that have been served with writs of execution. Thus, although OFAC received the Turnover Order in December 2013, given the volume of litigation documents the agency receives, it did not fully appreciate the issues raised in this case until April 2014, when counsel for Computershare attempted to contact the Department of Justice through an Assistant U.S. Attorney in the Southern District of New York who, in turn, notified the Departments of State, Justice, and the Treasury.[5] In any event, there is no specific temporal requirement for the submission of a statement of interest under 28 U.S.C. § 517. Thus, while the Government certainly would have preferred to set forth its views regarding the Turnover Order sooner, this submission should not be deemed untimely.

II. The Court Should Undertake a Full Analysis of Whether the Computershare Accounts Are Assets "of" Cuba

A. Consistent with important U.S. policy interests, TRIA and FSIA only permit the attachment of assets that are actually owned by the terrorist party

As this Court appears to have recognized in its Turnover Order, under TRIA and FSIA, in order for an asset to be subject to attachment and execution to satisfy a judgment in connection with a claim for which the foreign state was not immune under section 1605A, the asset must actually be owned by the judgment debtor terrorist party (or an agency or instrumentality thereof). *See* Turnover Order ¶ 4 (concluding that the Computershare accounts "are subject to execution and attachment under [TRIA] and [FSIA] because . . . the Republic of Cuba is the owner of those accounts"); *see also, e.g.*, *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-

[4] As plaintiffs' reply brief does not include page numbers, the Government refers to the page number provided by ECF.

[5] Specifically, on April 16, 2014, counsel for Computershare attempted to contact by phone an AUSA in the Southern District of New York to alert him to the issues raised in this case, and received an email response that same day soliciting more information. On April 25, 2014, counsel for Computershare sent an email describing the issues further. Again on that same day, the AUSA forwarded that email to individuals within the Departments of State, Justice, and the Treasury.

40 (D.C. Cir. 2013); *Calderon-Cardona v. JP Morgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 399-400 (S.D.N.Y. 2011), *appeal pending*, No. 12-75 (2d Cir.). TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets *of* that terrorist party (including the blocked asserts of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphasis added). Similarly, FSIA allows certain terrorism victims to attach certain "property *of* a foreign state" subject to a judgment under Section 1605A, and certain "property *of* an agency or instrumentality of such a state." 28 U.S.C. §§ 1610(a)(7), 1610(b)(3), 1610(g)(1) (emphases added).[6]

Supreme Court decisions indicate that, when used in the context of similarly worded statutes, "the use of the word 'of' denotes ownership." *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (quoting *inter alia Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also Calderon-Cardona*, 867 F. Supp. 2d at 399-400. The statutory language used in FSIA and TRIA is also notably narrower than the language used in the blocking regulations themselves, which apply to property in which the foreign state at issue has an "interest of any nature whatsoever," *see, e.g.*, 31 C.F.R. § 515.201 (CACR); *id.* § 538.307 (Sudan sanctions); *id.* § 560.323 (Iran sanctions), and in the specific context of Cuba, also extend to property in which Cuban nationals have such an interest, *see* 31 C.F.R. § 515.201(a). If Congress had intended for all assets subject to OFAC blocking regulations to be within the scope of TRIA or FSIA, it would most likely have adopted this broader language from the blocking regulations. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 439-40

[6] Contrary to plaintiffs' suggestion, section 1610(g) does not provide a basis for the attachment of the property at issue here. As noted above, section 1610(g) does not create an independent exception to the immunity of foreign state property from execution—rather, by its plain text, section 1610(g) only authorizes specified attachments "as provided in this section." 28 U.S.C. § 1610(g). Because section 1610 elsewhere requires a relationship to commercial activity on the part of the foreign state's property or by the foreign state agency or instrumentality as a condition of attachment, *see* 28 U.S.C. § 1610(a), (b), (d), it is apparent that Section 1610(g) carries forward this "commercial activity" requirement. *See Rubin v. Islamic Republic of Iran*, --- F. Supp. 2d ---, 2014 WL 1257947, at *7-*8 (N.D. Ill. Mar. 27, 2014). Plaintiffs do not argue that the Computershare accounts are being used by Cuba "for a commercial activity in the United States" per Section 1610(a)(7), nor does this appear to be the case given the lack of indication in the record that Cuba ever possessed or used this property for any purpose. The other exceptions to immunity from execution under Section 1610(a) and (b) similarly do not appear to apply. Therefore, attachment of the Computershare accounts is not available under the FSIA.

(D.D.C. 2012). This narrower reading of the statutory language is also consistent with FSIA's legislative history—the Conference Committee Report explained that section 1610(g)(1) authorizes the attachment of "any property in which the foreign state has a beneficial *ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Report) (emphasis added); *see also id.* (explaining that the provision "is written to subject any property interest in which the foreign state enjoys beneficial *ownership* to attachment and execution" (emphasis added)).

Furthermore, there is no indication that Congress intended to expand TRIA and FSIA beyond well-established common law execution principles, according to which "'a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor.'" *Heiser*, 735 F.3d at 938 (quoting 50 C.J.S. Judgments § 787 (2013)). Thus, TRIA's and FSIA's attachment provisions are best understood as applying only to those blocked assets actually owned by the terrorist party, not all blocked assets in which the terrorist party has any interest of any nature.[7]

Not only is this interpretation of TRIA and FSIA consistent with the plain language of those statutes, their legislative history, and traditional common law principles, but it is also supported by important U.S. policy interests. First, the United States has a strong interest in

[7] Plaintiffs argued in their Turnover Petition that *any* interest by Cuba in the Computershare accounts is sufficient to render the accounts attachable, even if the individual accountholders have an interest as well. For this proposition, they rely on an earlier district court opinion in *Heiser* stating that "judgment creditors of state sponsors of terrorism may execute against 'any property in which [the terrorist state] has any interest.'" Plaintiffs' *Ex Parte* Motion for Turnover Order at 8, ECF No. 26 (quoting *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 18 (D.D.C. 2011)). But that language is not good law—rather, it is discredited dictum. The same district court later concluded that both TRIA and FSIA require an actual ownership interest. *See Heiser*, 885 F. Supp. 2d at 437-44. Furthermore, if the district court's earlier ruling ever had any force, it was overturned by the D.C. Circuit. *See Heiser*, 735 F.3d 934. Similarly, the brief footnote in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010)—on which the original, now defunct *Heiser* opinion relied—is dicta and without persuasive value. The footnote, without explanation, characterizes FSIA Section 1610(g) as reaching "any U.S. property in which" the judgment debtor "has any interest." *Id.* But the case did not involve a section 1610(g) execution, and thus the statement is not persuasive. Finally, a handful of district courts have held that assets are attachable under FSIA and TRIA where the terrorist party has a mere interest in such assets (in contrast to actual ownership). *See Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 562-68 (S.D.N.Y. 2012), *appeal pending sub nom., Estate of Fuller v. Banco Santander, S.A.*, Nos. 12-1264, 12-1272, 12-1384, 12-1386, 12-1463, 12-1466, 12-1945 (2d Cir.); *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 529-41 (S.D.N.Y. 2010). Those courts fundamentally misunderstood the relationship between OFAC sanctions regimes, TRIA and FSIA, and existing sources of property law; and were mistaken for the reasons explained above, and by the D.C. Circuit in *Heiser* and Judge Cote in *Calderon-Cardona*. *See* 867 F. Supp. 2d at 401-04 (explaining why the district court's reasoning in *Hausler* was flawed).

preserving the President's ability to use blocked assets as a tool of foreign policy. Allowing some plaintiffs to attach blocked assets that are not owned by the sanctions target (in this case, Cuba) would selectively drain the pool of blocked assets, thereby reducing the leverage that these assets provide. *See Heiser*, 885 F. Supp. 2d at 441 ("Plaintiffs' sweeping interpretation would effectively—through future attachments and executions—eliminate the President's ability to use blocked assets as bargaining chips in solving foreign policy disputes."); *id.* at 435; *Rubin*, 709 F.3d at 57 ("The fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case.").

Second, an interpretation of TRIA and FSIA that permits attachment of blocked assets that the terrorist party does not own would effectively subsidize terrorist states by allowing plaintiffs to satisfy a judgment from assets owned by innocent third parties. *See Heiser*, 735 F.3d at 939-40 (concluding that Congress could not have intended that potentially innocent parties pay some part of a terrorist state's judgment debt). This approach would not further TRIA's and FSIA's aim of punishing terrorist entities or deterring future terrorism. *Cf.* 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement by Sen. Harkin that allowing victims of terrorism to satisfy judgments against the property of a terrorist party "impose[s] a heavy cost on those" who aid and abet terrorist, and that "making the state sponsors [of terrorism] actually lose" money helps deter future terrorist acts). In fact, not only would paying judgments from assets that are not owned by the terrorist party fail to impose a similar cost on the terrorist party, it would even assist terrorist parties by allowing them to reduce the outstanding judgments against them at the expense of innocent private parties. This concern is particularly acute here, where as a result of the Court's determination that Cuban laws nationalized the assets of account holders without any compensation, one set of victims of the Cuban regime's excesses would be paying Cuba's debt for Cuba's wrongs against other victims. That a substantial portion ($1 billion) of the plaintiffs' underlying judgment consists of punitive damages—intended to punish the wrongdoer rather than compensate the victim—further exacerbates this policy concern.

In sum, if the Computershare accounts are not owned by Cuba then they are not available to satisfy plaintiffs' judgment under FSIA or TRIA, and the Court's Turnover Order allowing for the transfer of these assets would be incompatible with the policy interests described above. Furthermore, absent a TRIA exception, the Court's order would amount to a transfer of blocked assets without an OFAC license, and thus would be null and void. *See* 31 C.F.R. § 515.203(e).

B. Before applying Cuban law, the Court should have conducted a choice-of-law analysis

Because TRIA and FSIA only allow the attachment of assets "of" the terrorist party, the Computershare accounts are not subject to attachment and execution unless they are owned by Cuba. Plaintiffs bear the burden of making this showing. *See Rubin*, 709 F.3d at 51. In its Turnover Order, the Court accepted plaintiffs' arguments and concluded that "by virtue of Cuban Law Nos. 567 and 568, the Blocked Assets held at Computershare are property of the Republic of Cuba and subject to attachment and execution." Turnover Order ¶ 6. But the Court's decision does not reflect that it engaged in any choice-of-law analysis to determine what law actually governs the question of ownership.

Because Congress has not provided a rule for determining ownership under TRIA or FSIA, federal courts generally apply state property law, and if necessary, state choice-of-law rules to determine whether assets located in the United States are subject to execution. *See, e.g.*, *Karaha Bodas Co. v. Pertamina*, 313 F.3d 70 (2d Cir. 2002) (applying state choice-of-law rules to determine ownership of property for purposes of attachment under FSIA); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (noting that FSIA, to which TRIA is appended, "operates as a 'pass-through' to state law principles" to "ensure that foreign states are liable in the same manner and to the same extent as a private individual under like circumstances"); *Calderon-Cardona*, 867 F. Supp. 2d at 400 (S.D.N.Y. 2011) (applying state law to determine ownership). Alternatively, at least one court "fashion[ed]" a federal common law rule of decision, applying certain provisions of the Uniform Commercial Code (UCC) to determine that contested fund transfers did not constitute property "of" Iran within the meaning

of TRIA or FSIA. *See Heiser*, 735 F.3d at 940 (noting that the UCC "is often used as the basis of federal common law rules").

Here, there is a clearly applicable choice-of-law provision under Massachusetts law. The section of the Massachusetts UCC governing securities (Section 8-110) provides that the applicable law for determining acquisition of a security entitlement from, and the duties of, a securities intermediary such as Computershare is the law of the "securities intermediary's jurisdiction"; this jurisdiction is determined either by reference to the relevant account agreement, or if not determined therein, by the location of the office serving the account or the intermediary's chief executive office.[8] Mass. Gen. Laws ch. 106 § 8-110 (providing a test for determining the relevant jurisdiction, as well as four fallback rules).[9] Alternatively, if the Court were to follow *Heiser* and engage in a federal common law choice-of-law analysis, UCC § 8-110 appears to be materially indistinguishable from the corresponding Massachusetts provision, and thus presumably would lead to the same result.

Whichever body of law is applied, the determination of ownership should be consistent with the weight of authority that favors a strict construction of attachment statutes in order to avoid punishing innocent parties—a consideration which is particularly acute with respect to blocked assets. *See Heiser*, 735 F.3d at 939. In other words, TRIA and FSIA should not be interpreted as recognizing an attachable property interest that would not otherwise be recognized in cases involving execution against unregulated assets.

The United States takes no position on whether federal courts should look to state choice-of-law rules or federal common law principles in order to apply TRIA's and FSIA's ownership requirement. But here, there is no indication reflected in the Turnover Order that the Court applied any choice-of-law rules before deciding that a foreign state's law, whatever its content, is

[8] It does not appear that any account agreements have been put in the record, and plaintiffs have not suggested that there is a relevant account agreement providing for the application of Cuban Law.

[9] Massachusetts UCC § 1-301 similarly provides that the parties to an account agreement may select the law applicable to that agreement, with Massachusetts law applying if there is no such selection where there is an appropriate relationship to Massachusetts.

the relevant law for determining ownership of accounts maintained by a securities intermediary in Massachusetts.

C. The Court should consider whether the principles embodied in the "penal law rule" preclude enforcement of the Cuban laws

Even assuming that a proper choice-of-law analysis would lead the Court to look to Cuban law to determine ownership of the assets, the court should consider whether application of the principles underlying the "penal law rule" should prevent it from applying Cuban Laws 567 and 568. Under that rule, courts in the United States have generally declined to give effect to foreign penal laws and foreign penal judgments in civil proceedings. *See, e.g.*, *United States v. Federative Republic of Brazil*, 748 F.3d 86, 95 (2d Cir. 2014) (holding that penal law rule applies to Brazil's efforts to seek United States enforcement of its forfeiture judgment by transferring the funds at issue from the United States to Brazil); *The Antelope*, 23 U.S. 66, 123 (1825) ("The Courts of no country execute the penal laws of another."); *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F. Supp. 73 (D. Mass. 1987) (examining Massachusetts provision codifying this principle); *see also* Mass. Gen. Laws ch. 235 § 23A (excluding "fine or other penalty" from the definition of "enforceable foreign judgments"). Plaintiffs themselves have described the Cuban laws at issue here as imposing a "penalty for violating a criminal law," *see* Pls.' Reply at 7, and the plain text of Law 568 also indicates that it is penal in nature, *see* State Department Official Translations of Cuban Law Nos. 567 & 568 (attached as Exhibit B). Thus, Law 568 is the type of law to which the penal law rule applies (and, as explained below, Law 567 appears to be irrelevant).

Courts have described the penal law rule as deriving from principles of national sovereignty. *See Brazil*, 748 F.3d at 92. As explained by the Second Circuit, the rule is designed to avoid "the danger in requiring United States courts to 'pass upon the provisions for the public order of another state,' something that 'is, or at any rate should be, beyond the powers of a court.'" *Id.* (quoting *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930)). Furthermore, "enforcement of foreign

criminal laws would enmesh courts in 'the relations between the states themselves,' a matter outside judicial competence and, in any event, 'intrusted to other authorities' under our system of separation of powers." *Id.* (quoting *Moore*, 30 F.2d at 604). The penal law rule is generally invoked where the foreign sovereign itself asks a U.S. court to enforce its penal laws. *See Brazil*, 748 F.3d at 93. Here, by contrast, third parties ask the Court to give effect to a Cuban penal law. Nonetheless, the rationales underlying the penal law rule apply with equal—if not greater—force when it is a third party rather than a foreign state that seeks to enforce a penal law in U.S. courts for the purpose of offsetting Cuba's debt to private parties.[10]

D. The Court should carefully scrutinize plaintiffs' questionable interpretation of Cuban law

Finally, even were the Court to apply Cuban law to determine ownership of the assets, several questions remain about how these laws might operate that should be clarified before the Court completes the turnover. First, a plain textual reading of the laws casts doubt on the explanation given by plaintiffs in support of their turnover motion. *See* State Department Official Translations. Law 567 appears to be irrelevant. It neither outlaws actions related to foreign holdings nor refers to the confiscation of property. Law 568, moreover, does not appear to operate in the manner that plaintiffs claim. Importantly, nowhere does it indicate that the Cuban government, in drafting this law, intended for it to apply to instruments already owned at the time of its enactment (September 23, 1959) that were not the subject of further transactions. Plaintiffs concede that the assets in question were acquired, at the latest, in the late 1950s. Law

[10] The Second Circuit recently applied the penal law rule in holding that a district court could not enforce a criminal forfeiture judgment based on a violation of Brazil's penal law unless an exception in the U.S.-Brazil mutual legal assistance treaty (MLAT) applied, and absent an enforcement request by the Attorney General on Brazil's behalf under 28 U.S.C. § 2467. *Brazil*, 748 F.3d at 91-96; *see also id.* at 97 (stating that "[i]nsofar as a forfeiture judgment in favor of a sovereign determines guilt and imposes condemnation—albeit against property rather than persons—based on violations of a nation's criminal laws, it is properly viewed as enforcing those criminal laws and, thus, constitutes a penal judgment for purposes of the penal law rule," and remanding to give Brazil the opportunity to make a request of the Attorney General under Section 2467). The United States has no MLAT with Cuba and Section 2467 seems inapposite in these circumstances, in part because Cuba has not requested enforcement of its laws. Moreover, the existence of this type of carefully integrated treaty and statutory framework governing when Brazil's penal law should be applied in U.S. courts, and the policy considerations underlying this regime, demonstrate why judicial enforcement of foreign penal law outside this type of framework compromises U.S. interests.

568 proscribes specific concrete actions, such as purchasing foreign currency, rather than merely failing to repatriate currency or other instruments held abroad. The law states its prohibitions in the present tense and makes no mention of retroactivity. It would appear that plaintiffs, at a minimum, should have presented evidence that the account holders in this proceeding purchased or traded their assets after September 23, 1959, in order to demonstrate Law 568's applicability.

Additionally, Law 568 appears to merely authorize—but not command—the Currency Stabilization Fund (the "Fund") to confiscate property on behalf of the Cuban government, and contemplates the Fund choosing not to exercise this authority. *See* Law 568 art. 9 ("*If* the Currency Stabilization Fund decides not to impose the administrative penalty of forfeiture . . . ." (emphasis added)). The plaintiffs have offered no evidence that the Fund acted pursuant to this permissive grant of authority and actually confiscated the assets, or that a Cuban court found them guilty of an offense under the law and imposed forfeiture as a penalty. In the absence of such evidence, or a more complete explanation of why the law actually operated in a manner contrary to its plain text, the Court should not have found that the Cuban government confiscated these assets.

Second, even assuming the Cuban government sought to nationalize the assets, the record does not indicate when such nationalization would have occurred. To the extent the nationalization was intended to occur after July 8, 1963—the effective date of the CACR—any such purported transfer of ownership would have been void in the United States without authorization from OFAC. *See* 31 C.F.R. §§ 515.201(b), 203(a); *see also* Order, *Martinez v. Republic of Cuba*, No. 1:10-cv-22095, at *2 (S.D. Fla. Aug. 29, 2011), ECF No. 71 (dissolving writs of garnishment) (attached as Exhibit C). OFAC has issued no such licenses with respect to these assets. At a minimum, the Court should have required evidence on when any purported nationalization of each account holder's assets occurred, and excluded from its Turnover Order any assets nationalized after July 8, 1963.

Third, even if the nationalization did take place before July 8, 1963, it is unclear whether Law 568 would have applied to all 70 account holders. The law does not specify who it purports

to cover. Although it prohibits certain conduct by "anyone," it does not specify whether this means only Cuban nationals or all persons residing in Cuba, including foreign nationals. It is also unclear whether the law would apply to someone who acquired the assets while residing in Cuba, but who left Cuba before the law was enacted. The CACR defines a Cuban "national" to include not only citizens, but also domiciliaries and permanent residents. 31 C.F.R. § 515.302(a)(1). It seems possible, therefore, that some of the 70 account holders may have fallen outside the scope of Law 568—because the account holder was either a foreign national or left Cuba after acquiring the assets but before Law 568 was enacted, or both—even though such persons would still have their assets frozen under the CACR. The defective notice protocol exacerbates this concern because account holders have not been given a reasonable opportunity to identify themselves. *See infra* note 13. Thus, if this issue is even reached, the Court should require evidence clarifying these facts before issuing a Turnover Order.

III. The Act of State Doctrine Is Inapplicable to this Case

Although the Court's Turnover Order does not cite the Act of State doctrine as the basis for its application of Cuban law, the plaintiffs, in their most recent filing, argue that the doctrine should apply in this case. *See* Pls.' Reply at 6. These arguments reflect a misunderstanding of the doctrine, which, by its terms, applies only to acts of a sovereign affecting property within its own territory. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed *within its own territory*." (emphasis added)); *Hilton v. Kerry*, --- F.3d ---, 2014 WL 2611146, at *4 n.4 (1st Cir. 2014) (same). The requirement that the act must occur and be operative in the sovereign's own territory is an essential element of the doctrine. Here, where the property allegedly affected by an official act of Cuba is in the United States, the doctrine is simply inapplicable.

Plaintiffs attempt to argue that an "extraterritorial exception" somehow creates an exception to the requirement that the act of state be in the territory of the state. This is simply not the case. The "extraterritorial exception" is an exception to the rule that an act of state must

be given effect and holds that, when inconsistent with the policy and law of the United States, "our courts will *not* give 'extraterritorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals.'" *Tchacosh Co., Ltd. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1336 (9th Cir. 1985) (emphasis added) (quoting *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972)); *see also Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903 (2d Cir. 1981). In simple terms, the exception allows courts to examine an act of state's effects on property in the United States; the court need *not* follow the Act of State doctrine when the exception applies. Most courts, in the face of foreign confiscatory laws purporting to affect property in the United States, have declined on policy grounds to give effect to the act of state;[11] in rare circumstances unlike those presented here, *see infra* note 12, courts have found that giving effect to certain such laws furthers U.S. policy. But the exception does not in any way require or suggest that the act of state must be given effect; in fact, just the opposite—the extraterritorial exception frees the court from the constraints of the Act of State doctrine.

Here, as a threshold matter, and for reasons explained above, choice-of-law rules dictate what substantive law should be applied, and thus the Act of State doctrine and extraterritorial exception are irrelevant. Likewise, plaintiffs' contention that "the Cuban laws at issue are *not* confiscatory," but instead are criminal laws that impose a forfeiture penalty for non-compliance, Pls.' Reply at 6-7 (emphasis added), underscores that the penal law rule would bar the Court from giving effect to the Cuban laws. *See supra* Section II.C.

[11] *See, e.g.*, *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (declining to enforce Iraqi ordinance purporting to confiscate account in New York of deceased Iraqi King on grounds that it was a foreign ordinance affecting property in the United States that conflicted with U.S. law and policy); *Williams & Humbert Ltd. v. W.&H. Trade Marks Ltd.*, 840 F.2d 72, 75-77 (D.C. Cir. 1988) (considering it "clear that, had Spain attempted to expropriate without compensation property that was owned directly by the [applicant] and that was within the United States at the time of expropriation, our courts would not assist Spain in obtaining such property within the United States" and finding that same principle also applied with respect to expropriated company holding U.S. trademark in which applicant owned shares); *Maltina Corp.*, 462 F.2d at 2027 (considering the expropriation of the assets of a Cuban corporation by the Cuban government to be a foreign decree purporting to expropriate property within the United States insofar as the related United States trademark was concerned, which the court therefore tested for compatibility with United States laws and policies and found it to violate the principle prohibiting deprivation without compensation).

In any event, plaintiffs' contention that reliance on Cuban law for the turnover of the assets in the United States is appropriate because (1) such transfer is consistent with U.S. policy, and (2) the previous owners have not objected, is meritless. *See* Pls.' Reply at 11-16.[12] Even if these factors were relevant, it is the executive's determination of policy interests, not plaintiffs' views, that should control. *See Rubin*, 709 F.3d at 57; *Heiser*, 885 F. Supp. 2d at 441. As noted above, the United States has a strong interest in preserving the President's ability to use blocked assets as a tool of U.S. foreign policy. Moreover, it would be contrary to U.S. policy interests to interpret and apply Cuban law such that it automatically transfers assets owned in the United States by private parties to the Government of Cuba without a license and without compensation, and then allow those assets to be used to satisfy Cuba's legal obligation to other private parties—with one set of Cuba's victims effectively paying Cuba's debt to other victims. Similarly, it would not be consistent with U.S. policy interests to permit attachment of property subject to U.S. regulatory controls based on application of a Cuban penal law for the confiscation of property. Lastly, the failure of the record account holders to object, or otherwise to assert an interest in these assets during the period in which they have been blocked, should not be viewed as consent. The Government has serious concerns as to whether the notice protocol utilized here was adequate to provide account holders with actual notice.[13] In any event, the absence of

[12] Plaintiffs primarily rely on *Banco Nacional*, 658 F.2d 903, in support of this argument. But for at least three reasons, *Banco Nacional* is inapposite. First, the relevant act of state at issue in that case was the nationalization of several U.S. banks *located in Cuba*. Thus, the underlying taking occurred in Cuba, not the United States. The *Banco Nacional* court simply recognized the extraterritorial *effects* of the nationalization of property situated in Cuba. Second, as a result, there was no need for the court to interpret Cuban law to determine who owned the nationalized assets—the Court was only faced with the question of whether the extraterritorial effects of the nationalization should be recognized. Third, in *Banco Nacional*, there is no indication that the United States took the position—which it takes here—that the recognition of the extraterritorial effects of the nationalization would be contrary to U.S. policy. And in *United States v. Belmont*, 301 U.S. 324 (1937), on which *Banco Nacional* relies, *see* 658 F.2d at 908-09, the recognition of the foreign expropriation clearly *advanced* U.S. policy, as reflected in an agreement between the United States and Russia.

[13] Computershare produced records indicating a Cuban address for each account holder dating from when the account was opened. The plaintiffs apparently were not able to confirm whether the 70 account holders, or their successors in interest, still reside at the address on file or even in Cuba, and there appears to be nothing in the record that would justify that assumption. The Court ordered the plaintiff to send, via U.S. Postal Service direct mail, a notice and other materials, with Spanish translations, to the 70 account holders at the address Computershare had in its files; to publish two notices in the International Herald Tribune (now the International New York Times (INYT)); and to notify the Government of Cuba through the Cuban Interests Section in Washington. *See* Turnover Order

objections by the account holders cannot substitute for a sound legal basis establishing Cuban government ownership of the property.

CONCLUSION

The United States has a substantial policy interest in assuring that TRIA and FSIA are correctly construed and applied, particularly to ensure that assets that are not owned by a foreign state or terrorist party are not attachable to satisfy a judgment against the foreign state or terrorist party. In accordance with the principles set forth herein, the Government respectfully urges the Court to reconsider its Turnover Order.

Respectfully submitted this 30th day of June, 2014,

STUART F. DELERY
Assistant Attorney General

CARMEN M. ORTIZ
United States Attorney

JOSEPH H. HUNT
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK (MA Bar No. 679207)
Trial Attorney
United States Department of Justice

¶¶ 10-12. The Court set a deadline of January 31, 2014, for any objections. *See id.* ¶ 15. It seems likely that many of the account holders, or their successors, no longer reside at an address from 50 years ago, but instead will have moved elsewhere, possibly abroad. Even for those still residing at the address on file, many may not have received the notice before the deadline, given the lack of formalized, regular direct mail service between the United States and Cuba since February 1968, and the general unreliability of U.S.-Cuba mail delivery. Mail between Cuba and the United States is currently routed through third countries, and regularly experiences delays of weeks or months transiting in each direction. The INYT notices, moreover, appeared only in English on December 18 and 23. The INYT is not available to the Cuban public. It also seems unlikely that the Cuban government, upon receiving the notice at the Interests Section, would take any action to find the account holders and pass on the notice. The record indicates that only two individuals have identified themselves to the Court or parties. One individual in Cuba received the notice in the mail on January 14, and sent the Court a letter (dated January 16 and filed May 19) expressing "protest and disagreement." *See* Letter from Maria Ana Abarrio Sainz, ECF No. 63. Computershare reported that a second individual, an heir of one of the account holders, separately contacted it about efforts to obtain an OFAC license to unblock assets, and had not received notice pursuant to the notice protocol. *See* Emergency Omnibus Mot. of Trustee Process Def. Computershare Inc. at 5, ECF No. 45.

Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7306
Washington, D.C. 20001
Tel: (202) 305-8573; Fax: (202) 616-8470
Email: benjamin.l.berwick@usdoj.gov

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK